

EXHIBIT F

**AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR
Tammy Brynie, Esq., Arbitrator**

In the matter of the
arbitration between:

National Association of
Government Employees

Case No. 11 390 0353 12
Remand

- and -

Massachusetts Trial Court

Decision and Award

For the Employer

Jean Strauten Driscoll, Esq.
Anne-Marie Ofori-Acquaah, Esq.

For the Union

Michael F. Manning, Esq.
Rebecca Lee Mitchell, Esq.

This case is the result of an order of the Superior
Court in National Association of Government Employees,
SEIU Local 5000 and Chief Justice for Administration
and Management of the Trial Court, Suffolk CA 2010-4884
through 4894. The Superior Court case was a

consolidated proceeding involving petitions to vacate eleven arbitration awards. The Superior Court vacated all of the awards and remanded them for further arbitral review. The issue as framed in the court order, and adopted by the parties, is:

Whether the Trial Court violated the rights of the grievant(s) under the collective bargaining agreement by appointing the successful candidate to the specific position at issue.

Is so, what shall be the remedy?

Overall Background

The parties are signatories to a collective bargaining agreement that includes, at Article XX, a Seniority provision. Article 20.01 provides:

The Employer recognizes the principle of seniority for employees covered by this Agreement so that when qualifications, such as training, skill, ability and other relevant qualities are considered equal by the Employer, the Employer shall give preference in cases of transfer, layoff, shift assignments, reassignments, promotion and overtime to employees with the longest service ... Joint Exhibit #1.

Over the years, the Union has relied upon Article XX to challenge employment actions taken by former Probation Commissioner John J. O'Brien. On at least eleven occasions, contractual grievances challenging employment actions were filed on behalf of an employee

who was more senior than a successful applicant, processed to arbitration and an arbitrator's Award issued. Each Award considered an application process consisting of at least two rounds of interviews resulting in a certification that the person selected was the best or most qualified candidate. Typically, an initial screening panel was held at the court level. The initial panel usually consisted of the court's Presiding Justice, its chief probation officer and a regional representative from the probation service. The initial interviews and evaluations were followed by a final round of interviews conducted by probation management personnel. Generally, Deputy Probation Commissioners Francis Wall and Patricia Walsh conducted the final interviews for probation officer and assistant chief probation officer vacancies. Arbitrators, citing the level of discretion contractually reserved by the Trial Court, afforded deference to the judgment of the Probation Department managers who participated in the final round of interviews, unless that judgment was shown to be arbitrary or capricious. As a result, in eleven cases, arbitrators relied upon the testimony of, and evidence from, Probation Department managers and determined that

the challenged employment action did not constitute a violation of the collective bargaining agreement.

By the Spring of 2010, the Probation Department was the subject of intense scrutiny with respect to its hiring and promotional practices. The Supreme Judicial Court, on May 24, 2010, appointed an Independent Counsel, Paul F. Ware, Esq., to investigate, among other matters, alleged improprieties with respect to the hiring and promotion of employees within the Probation Department. Ware's investigative process involved interviewing more than two dozen witnesses, taking testimony from 67 witnesses under oath, and reviewing more than 525,000 documents collected from the Probation Department and disparate witnesses.¹ On November 9, 2010, Ware filed his report with the Supreme Judicial Court, Joint Exhibit #3.

The Independent Counsel found that there were fundamental patronage problems within the Probation Department. In its general conclusions, the Ware Report indicated that "[t]he hiring and promotion process in the Probation Department is corrupt and has disproportionately favored politically-connected candidates." Joint Exhibit #3, p. 2. The Independent

Counsel further determined that "[t]he fraud is systemic and not episodic." Joint Exhibit #3, p. 9.

Specifically, the Ware Report stated:

[T]he hiring and promotion process within the Probation Department during Commissioner O'Brien's tenure, and particularly since the Commissioner was granted statutory authority with respect to hiring and promotion in 2001, has not been intended to select "the most qualified individual" for each position "solely on the basis of merit." Instead, hiring and promotion have been thoroughly compromised by a systemic rigging of the interview and selection process in favor of candidates who have political or other personal connections. Joint Exhibit #3, p.2-3.

The Ware Report concluded that the Probation Department's Deputy Commissioners were complicit in Commissioner O'Brien's fraud. Joint Exhibit #3, p. 15. The Independent Counsel determined that "senior management for the Probation Department, including all of the Deputy Commissioners, were involved in implementing a system of fraudulent hiring and promotion in favor of politically-connected candidates pre-selected by the Commissioner." Joint Exhibit #3, p. 15. According to the Independent Counsel, "numerous witnesses testified that [Deputy Commissioners] Wall and Walsh regularly provided names of preferred candidates and received names of candidates whom they

¹ Ware Report, p. 1-2, Joint Exhibit #3.

ranked and scored." Joint Exhibit #3, p. 16. Edward McDermott, who was employed at the Office of the Commissioner of Probation, testified that the message he was given by Wall and Walsh when he sat on panels with them was unambiguous -- the favored candidates were to be ranked at the top of the list. Joint Exhibit #3, p. 7.

The Independent Counsel considered both the local panels and final interview rounds. Local panels -- usually comprised of the court's First Justice, its chief probation officer and a designee of the Commissioner (often the relevant regional supervisor)-- screened and evaluated promotional candidates.

According to Ware, "Regional supervisors whom we interviewed typically testified that they did not share names of sponsored candidates with the judges on their interview panels." Joint Exhibit #3, p. 98. The judges, and the chief probation officer of a court, were often "personally familiar with each candidate's strengths and weaknesses based on his or her performance as a probation officer in that court."

Joint Exhibit #3, p. 79. Local panel members ranked candidates' responses to a series of standard questions and the top candidates were forwarded to a final round

interview. The rankings compiled by the local panel, however, were not reviewed during the final interview.

The final interview panel then convened. The final interviews were usually conducted by Deputy Commissioners Wall and Walsh, who rank ordered the final round candidates based on their responses to standard questions. Then, Commissioner O'Brien selected the top ranked candidate for promotion. Joint Exhibit #3, p. 80. The Independent Counsel, however, stated:

The interview procedures used by Probation to hire and promote were, however, in large measure a facade and sham. The evidence is unambiguous that for most open positions, interviewers at each stage of the hiring process were provided the names of one or more candidates favored by Commissioner O'Brien with the direction that the favored candidates be given preferential ranking and/or scoring. Joint Exhibit #3, p. 90.

The Independent Counsel noted that, on some occasions, candidates passed over for promotion had filed grievances concerning the promotion process. Then, during the related arbitration proceeding the members of the final interview panel ordinarily were called to testify, with the result that arbitrators routinely recounted that the final interview panel members' ranking of candidates was based on the

interviewers' consideration of the candidates' answers to interview questions and the candidates' application materials. But, according to the Independent Counsel's review, "Probation management may have testified falsely in grievance proceedings." Joint Exhibit #3, p. 33. Specifically, after reviewing numerous arbitration files, the Independent Counsel noted that "in none of them did a final interview member (usually Wall and Walsh) ever disclose that the scoring of a candidate was based on receipt of that candidates' name from Commissioner O'Brien or one of his deputies." Joint Exhibit #3, p.33. Yet, the Independent Counsel noted, "witnesses consistently testified that preferred names were handed down for most of the promotional positions for which probation officer union members applied." As a result, Ware concluded: "It is probable that on at least some occasions, the final interview panel members falsely described the basis for their decisions without any reference to the Commissioner's expression of a preference for a particular candidate, and/or falsely denied receiving names from OCP." Joint Exhibit #3, p. 34.

Although the Independent Counsel found "a degree of abuse and systemic corruption in hiring and promotion

that cannot be ignored ..."², his report also included important caveats. As Ware noted, "some of those hired or promoted as a result of the rigged process would and should have been hired or promoted on their own merits." Joint Exhibit #3, p. 34. The Independent Counsel further reported that "the testimony was that in some cases the sponsored candidates were themselves the most qualified, or arguably the most qualified candidates." He also observed: "While there was testimony that more qualified candidates were routinely passed over, it may be difficult to identify such cases with confidence." Joint Exhibit #3, p. 45.

The Ware Report included a recommendation that policy changes concerning personnel actions be considered. Joint Exhibit #3, pp. 45-47. The Supreme Judicial Court appointed a Task Force to review the Probation Department's hiring and promotion procedures. The Task Force, on February 10, 2011, issued its "Action Plan for Reform and Renewal of Probation Department Hiring and Promotion Practices." Joint Exhibit #6. The Chief Justice for Administration and Management, in turn, formed a Personnel Policy Committee to undertake a thorough review of the Trial

² Joint Exhibit #3, p. 307.

Court Personnel Policies and Procedures. Joint Exhibit #8.

In addition, the Independent Counsel recommended that appropriate federal and state law enforcement authorities be made aware of the findings of the Report. Joint Exhibit #3, p. 48. Ultimately, former Commissioner O'Brien and Deputy Commissioners Elizabeth Tavares and William Burke, III, were indicted in federal court. Joint Exhibit #5.

The Union filed petitions in Superior Court to vacate eleven arbitration awards on the basis that they were procured by fraud, as detailed in the Ware Report. The Superior Court, on February 14, 2012, vacated all of the awards and remanded them for further arbitral consideration, to determine whether the rights of the grievants under the collective bargaining agreement were violated. The Court required that the successful candidates in the challenged employment actions receive notice of the new proceedings, "so that they may be heard in such manner and under such circumstances as the arbitrator permits." Joint Exhibit #10, p. 2. The Court specified that any remedy could not be inconsistent with recent statutory changes in c. 93 of

the Actions of 2011. Joint Exhibit #10,p.2; Joint Exhibit #7.

In the meantime, a grievance challenging a March 2008 Probation Department promotion was pending before Arbitrator James Litton. Relying on aspects of the Ware Report, Litton determined that the Trial Court had acted in an arbitrary and capricious manner by selecting the successful candidate. Chief Justice for Administration and Management of the Trial Court of the Commonwealth of Massachusetts and National Association of Government Employees, AAA No. 1139-2006-09, (Litton, 2012), Joint Exhibit #4. Edward McDermott and Deputy Commissioner Francis Wall conducted the final interviews in the promotional challenge considered by Litton. Litton cited McDermott's testimony to the Independent Counsel, that "every time there was a panel, Fran Wall made known to [him] that this candidate was the commissioner's top choice...", as conclusive evidence that the promotional panel "did not make a final selection for ACPO at the Woburn District Court on the basis of an honest comparison of the qualifications of the competing applicants as Article XX, Section 20.01 requires." Joint Exhibit #4, p. 16. As remedy, Litton ordered "a new selection process for

the ACPO position at the Woburn District Court, with access to the re-selection process limited to the five candidates who initially applied for the posted position -- to the extent to which they wish to participate." Joint Exhibit #4, p. 17.

A pre-hearing conference and three days of hearing were held with respect to the eleven remanded matters at issue here. All successful applicants received notice of the conference and hearing dates. Joint Exhibit #9. Many of the successful applicants retained counsel for the proceeding. Successful applicants had the opportunity to participate at arbitration and submit documentary and testimonial evidence. The arbitration transcript was made available for review at the AAA and successful applicants had the opportunity to file post-hearing submissions for my consideration.

At arbitration, the parties entered the following stipulations:

1. All successful applicants and grievants met the qualifications for the positions at issue in their respective cases.
2. The final interview results indicated that each of the successful applicants were the top scorers.
3. Former Commissioner of Probation John O'Brien certified to the CJAM that all successful applicants were the 'most qualified' or 'best candidate'.

4. The arbitrator is without authority to order the promotion/appointment of any particular employee.

5. The arbitrator is to retain jurisdiction of this matter for a period not to exceed 180 days, unless that period is extended by mutual agreement of the parties.

The Union subpoenaed two of the Deputy Commissioners who conducted most of the final round interviews, Francis Wall and Patricia Walsh. Each, through counsel, indicated that, if called to appear, he or she would assert the constitutional right to not testify. Joint Exhibits #11B, #11C. As a result, they were excused from appearing.

At the conclusion of the arbitration, the parties and a number of successful applicants filed post hearing submissions. I will detail the parties' overall contentions, outline my overall analytical framework and then separately consider each grievance and challenged employment action.

Overall Positions of the Parties

The Union contends that the Trial Court violated the contractual rights of the grievants when it appointed

the successful candidates to the positions at issue.³ Arbitrators have traditionally invested in the Employer the maximum latitude in determining the identity of the 'most qualified' applicant for any particular appointment. Nonetheless, at arbitration, the Trial Court has been required to describe its process in evaluating applicants and explain how the qualifications of the respective applicants distinguished the successful applicant from the grievants. The Trial Court is the only party who must produce their evaluative process and demonstrate its compliance with the contract.

Here, however, the Trial Court presented nothing. The interviewers of the final applicant pool declined to come to the arbitration hearing and defend their decisions. In the absence of any evidence that the Employer considered the successful applicant to have some edge in terms of the contractual criteria of "training, skill, ability or other relevant qualities" the contract mandates that seniority be utilized to

³ The Union did not compare, or evaluate, the respective qualifications or abilities of candidates in its post-hearing submission. Instead, the Union presented an overall argument that, in light of the findings and conclusions of the Ware Report, and in the absence of any Trial Court justification for the selections during the remand proceedings, all of the challenged employment actions should be done again.

make these types of selections. The absence of evidence that the Trial Court considered the successful applicant to be more qualified, so that seniority would not automatically reign, is arbitrary and capricious. The hand of the arbitrator is forced. In the absence of any type of support for its decision, the finding that the decision was arbitrary can not be avoided.

In addition, the Ware Report concludes that there was widespread abuse in the hiring and promotion practices of the Probation Department. According to the Ware Report, the Probation Department's senior management team conceded that they knew or participated in a corrupt appointment system in which candidates for promotion were pre-selected. There is ample evidence that Wall and Walsh, in conjunction with Commissioner O'Brien, pre-selected candidates.

It is not significant that the Ware Report did not independently evaluate and individually declare that each of the employment actions challenged here were tainted by a rigged interview and selections process. Instead, the Ware Report involves countless details concerning the pervasive corruption of the hiring and promotion process. The arbitrator should rely on the evidence of systemic and total corruption depicted in

the Ware Report, and the absence of any evidence in support of the Trial Court's personnel decisions at arbitration, to concluded that the grievants' contractual rights have been violated.

As remedy, the Union seeks to address the Trial Court's failure to have a fair promotional process. To that end, the fairest remedy is a "re-do." If, after a re-do, the Trial Court determines that the successful applicant should have received the position, then he/she will be appointed again. Any re-do should be limited to the participants in the original applicant pool, if she or he remain interested. Finally, in the event an applicant from the original pool is no longer an employee (i.e., the person quit, moved on to another position or retired), he or she should no longer be included in the original applicant pool when the position is re-posted.

* * * *

The Trial Court recognizes that there are significant interests at stake here. The Employer does not condone and will not defend any improprieties in the hiring or promotion practices of the Probation

Department that resulted in the appointment of less qualified individuals on the basis of political favoritism. But, the Union's claims paint with too broad a brush. Neither party can provide evidence of the specific decision-making process in each of these cases. Instead, the Union relies on inferences: inferences from the Ware Report; inferences from the absence of certain witnesses; and, in some cases, inferences from the existence of political contributions.

The issue of burden of proof permeates each of these cases. The Superior Court directed that this arbitration determine whether the rights of the grievants under the collective bargaining agreement were violated by the selection of the successful candidates. The Union argues that the failure of witnesses to testify about the promotion or transfer of successful candidates, coupled with the conclusions of the Ware Report that many of the appointments were influenced by former Commissioner O'Brien, necessarily leads to a conclusion that all of the cases must be decided in the Union's favor. A conclusion that all of the selections must be done anew, however, is not immediately warranted. Contrary to the Union's

position, the burdens of proof and the rights of the grievants are not so easily framed.

For most of the cases presented here, the Ware Report provides no direct information. Its use to infer that each of the present cases "must" have been a tainted appointment process is unwarranted. The two Deputy Commissioners who conducted most of the final round interviews, Patricia Walsh and Francis Wall, did not appear at arbitration, having asserted their rights to remain silent. Their absence from this hearing does not support an inference that each of the appointment decisions they made in the present cases was to promote or appoint a less qualified candidate based on political considerations and/or a directive from former Commissioner O'Brien. Instead, the individual hearings have produced other information about the selection process that is relevant and material. The first round interview scores of the Judges on the interview panel are relevant and material to a determination of whether the rights of a particular grievant may have been violated. A grievant, for example, who is ranked lower than other applicants who were deemed more qualified by the Judge, who, in an in-house promotion case presumably knows and has observed the job performance

of each of the applicants, cannot have been disadvantaged even if one of the other applicants gets selected upon some "recommendation" at the final stage of the process because, arguably, the grievant wouldn't have received the position anyway.

The Trial Court's overriding interest is in the effective operation of the court system, including the Probation Department, and the fair treatment of those who work in the system. Careful consideration of each of the appointment processes at issue here, consistent with the Superior Court mandate, is crucial. In order to find that the decision to promote or appoint a specific candidate was arbitrary or capricious, the record must contain, by a preponderance of the evidence, proof that the successful candidate was advance for reasons other than merit.

Should the arbitrator conclude than one or more of these selections should be re-done, the re-selection process: should not be unduly constricted by time limit; should be limited to the original applicant pool; and, to the extent possible, should be restricted to the most manageable number of persons to be interviewed. Employees who have left the Trial Court by retirement or otherwise should not be eligible to

apply. Additional consideration must be given to situations where the successful applicants are no longer in their positions. Finally, any remedy must be consistent with new statutory changes and in keeping with the revised merit-based process that is in the process of being implemented.

Opinion

It is well-settled that the language of Article 20.01 gives the Trial Court maximum flexibility and discretion in assessing the "training, skill, ability, and other relevant qualities" of candidates for positions covered by the parties' collective bargaining agreement. It is only when the Trial Court determines that those qualifications are equal that seniority becomes the tie-breaking criteria. See, e.g., National Association of Government Employees and Trial Court of the Commonwealth, AAA No. 11 390 1344 06, (Cochran, 2007); National Association of Government Employees and Trial Court of Massachusetts, AAA No. 11 390 743 07, (Brynie, 2008).

However, arbitrators have also recognized that the Trial Court's discretion is not absolute. The

selection process must be fair and the Trial Court must not undertake its selection in a manner that is arbitrary, capricious or discriminatory. See, e.g., National Association of Government Employees and Trial Court of the Commonwealth, AAA No. 11 390 2331 06, (Cochran, 2007); National Association of Government Employees and Trial Court of Massachusetts; AAA No. 390 1508 07 (Brynie, 2008). The Trial Court is obligated to "make a final selection [for promotion] on the basis of an honest comparison of the qualifications of the competing applicants as Article XX, Sec. 20.01 requires." Chief Justice for Administration and Management of the Trial Court of the Commonwealth of Massachusetts and National Association of Government Employees, AAA No. 1139-2006-09, (Litton, 2012), p. 16.

Traditionally, the managers from the Trial Court's final interview panel have testified at arbitration and have provided detailed grounds and rationale for their selection of successful candidates. In each of the eleven remanded matters, arbitrators relied upon such testimony and determined that the Trial Court's process and judgment was neither arbitrary nor capricious.

Here, Francis Wall and Patricia Walsh, the final interview team in all but one of the challenged

selections⁴, did not testify. As a result, no full explanation of, or rationale for, the selection of the successful applicants was presented on remand. As the Union correctly notes, in the absence of evidence that the Trial Court considered a successful applicant to have some edge in terms of the contractual criteria of "training, skill, ability or other relevant qualifications" the contract indicates that seniority will be a deciding factor.

Unlike the Union, however, I do not consider Wall and Walsh's failure to testify to be, necessarily, dispositive. As repeatedly recognized and acknowledged during the remand proceedings, the present situation is novel. Here, I have been instructed, in Judge Connolly's order, to determine "whether the Trial Court violated the rights of the grievant under the collective bargaining agreement by appointing the successful candidate to the specific position at issue." National Association of Government Employees, SEIU Local 5000 and Chief Justice for Administration and Management of the Trial Court, Suffolk CA 2010-4884 through 4894, p. 2 (emphasis added).

⁴ Patricia Horne joined Patricia Walsh in conducting interviews for an Assistant Chief Probation Officer position at the Milford

As a result, I carefully review each individual case to assess whether or not each grievant's contractual rights have been violated. My review will include the facts found by the arbitrators in the underlying arbitration matters, excluding any findings based on the testimony of, and discounting the overall reliability of the scorings and rankings generated by, Walsh and Wall. In each instance, I examine the Ware Report for specific information relating to each remanded matter and consider the inferences, if any, to be drawn from the Ware Report in each case. I consider the documentary information produced by the successful applicants, especially for insights into how the candidates were evaluated by personnel who both knew and worked with them at the local level.⁵ I also carefully consider the testimony of the successful applicants, who, like the grievants, have significant interests at stake here. Ultimately, in each case, I will evaluate the available, reliable evidence to determine whether the preponderance of the evidence

District Court. Horne appeared at the remand proceeding, pursuant to a subpoena.

⁵ The Union argues that the initial interview scores and marks are not relevant, as they were not considered by the final interview panel. The Ware Report, however, indicates that the names of sponsored candidates were not, typically, shared with the judges on local panels. As a result, I consider local judges' perspectives in my review.

indicates that a grievant's qualifications for a position were honestly compared or assessed or whether, instead, there is a sufficient basis to conclude that the selection process was based on criteria other than those established by the parties at Article 20.01.

Each case, including the evidence and arguments advanced by a successful applicant, is separately considered, below.

Grievant:	Theresa Adamson
Successful Applicant:	Richard Ferrino
Represented By:	Carmen A. Frattaroli, Esq.
Original AAA No:	11 390 01344 06
	Joint Exhibit #2(1)

The Grievant, Theresa Adamson, with twenty seven years of Trial Court service, applied for the position of Assistant Chief Probation Officer (ACPO) at the East Boston District Court in 2006. Richard Ferrino, who was hired in 1998, applied for the ACPO position, too. Ferrino had a BA from the University of Lowell and, at the time of his application for promotion, was enrolled

in the same university's Master's program in criminal justice . Ferrino Exhibit #4.⁶

A local panel consisting of First Justice Mahoney, Chief Probation Officer David Arinella and Mark McHale from the Office of the Commissioner of Probation (OCP) convened. Judge Mahoney said that the three candidates were equally qualified, Ferrino Exhibit #8, while McHale and Arinella ranked Ferrino first. Ferrino Exhibits #6 and #7. Arinella's form, however, is dated 1/20/06, while the other two panelists' ranking sheets are dated 1/19/06. All three original applicants were forwarded for a second interview with Deputy Commissioners Wall and Walsh.

In the original arbitration, Arbitrator Cochran considered Arinella's ranking form, noting both that it was dated a day later than the other rankings and the fact that the ranked names had not been written by Arinella. Cochran, however, acknowledged Arinella's testimony, to the effect that the names, as ranked, reflected his views and recorded his denial that anyone from the OCP had told him how to rank the candidates. Joint Exhibit #2(1), p. 4.

⁶ The record does not contain details about Grievant Adamson's educational background.

McHale provided testimony to the Independent Counsel. The Ware Report finds that, "[l]ike others, Regional Supervisor Mark McHale testified that he received the names of favored candidates from the Commissioner's Office, 'having received such names from First Deputy Commissioner Tavares, Deputy Commissioners Francis Wall and Patricia Walsh, and Edward Ryan.' Joint Exhibit #3, p. 131. When asked, '[W]ere there instances when you were given names of preferred candidates during the hiring process?', McHale replied; 'The way it was, I was given names, and they said 'In consideration of how these people do during the interview process, could you give them some consideration.' " McHale affirmed that he understood that the named candidates were supposed to make it through to the next round. Joint Exhibit #3, p. 132.

Cochran determined that, prior to the final interviews, several of the Grievant and Ferrino's co-workers overheard Ferrino making comments that led them to believe that he was going to get the job. Cochran specifically cited two workers who recalled Ferrino talking, in advance of the final interviews, of the changes he would make when he became the ACPO. Joint Exhibit #2(1), p. 5.

Indeed, during the final interviews with Walsh and Wall, Ferrino received a 40 score, reflecting perfect marks. The Grievant received a mark of 26, with the third candidate receiving an even lower score. Ferrino Exhibit #14. After acting as ACPO in East Boston for about six years, Ferrino, in April of 2012, transferred to an ACPO position at Salem District Court. Ferrino Exhibit #15.

Ferrino argues that there is no specific evidence indicating that the Trial Court acted in an arbitrary and capricious manner with respect to his selection. General inferences from the Ware Report are insufficient to reach such a conclusion. Wall and Walsh, in the underlying arbitration, indicated that no one from OCP expressed a preference for any of the candidates. The Independent Counsel noted, in his report, that "it was possible that this sworn testimony was truthful, at least with respect to these specific cases." Joint Exhibit #3, p.34. In the absence of any evidence to suggest that Ferrino was not the better candidate for the position, the evidence does not meet the burden of showing that Grievant Adamson's rights were harmed under the collective bargaining agreement.

I disagree. The facts as found by Arbitrator Cochran take on a special resonance in light of the Ware Report. The Independent Counsel reported that "numerous witnesses testified that Wall and Walsh regularly provided names of preferred candidates and received names of candidates whom they ranked and scored." Joint Exhibit #3, p. 16. McHale, a member of the local panel in Adamson's case, admitted to the Independent Counsel that (although not specifically identifying the present case) he had received the names of favored candidates from the Commissioner's Office. Arinella, another member of the local panel, dated his ranking sheet a date after everyone else, and turned in a list of names that was actually written by someone else. Although Arinella testified, before Arbitrator Cochran, that the rankings reflected his views and denied receiving names of favored candidates from OCP, I also note that the Independent Counsel concluded that Commissioner O'Brien retaliated against employees who refused to pass preferred candidates through the preliminary rounds of interviews. Joint Exhibit #3, p.13. After the initial round of interviews, several Trial Court employees recalled hearing Ferrino make comments about his upcoming changes as an ACPO, as if

the promotion were a foregone conclusion. Then, after the initial round evaluators -- including the court's First Justice -- had ranked the three candidates equally, Ferrino received perfect final round interview marks from Wall and Walsh, Ferrino Exhibit #14, while the other two candidates lagged far behind.

The available evidence does not support a determination that the selection of the ACPO for the East Boston District Court in 2006 was based on the criteria established in Article 20.01. Specifically, I am not persuaded that the 2006 East Boston ACPO selection process was made on the basis of an honest comparison of the qualifications of the competing candidates. Instead, a variety contemporaneous circumstances indicate that the process was tainted by pre-selection, or favored candidate, considerations. As a result, I conclude that Grievant Adamson's rights pursuant to the collective bargaining agreement have been violated.

As remedy, the Trial Court shall conduct a new selection process for the ACPO position at the East Boston District Court originally posted on January 4, 2006. Access to the re-selection process shall be limited to the three candidates who originally applied

for the posted position and who remain employed by the Trial Court -- to the extent they wish to participate.⁷ The re-selection process shall be conducted by personnel who are tainted neither by the general promotion/hiring scandal at the Probation Department nor by the particular facts of this underlying case.

Grievant:	Lynn Affonso
Original AAA No:	11 390 2362 05 Joint Exhibit #2(2)
Grievant:	William Cavanaugh
Original AAA No:	11 390 2363 05 Joint Exhibit #2(3)
Successful Applicant:	Joseph Abber
Represented By:	Gabriel O. Dumont, Jr., Esq.

Joseph Abber's 2005 promotion to Assistant Chief Probation Officer at the Plymouth County Juvenile Court led to two grievances.⁸ At the time of his promotion, Abber had been a probation officer for about nine

⁷ Ferrino's recent transfer to the Salem District Court may affect his participation in the re-selection process.

⁸ Abber argues that, by pursuing both grievances, the Union has conceded that Cavanaugh's rights (as the most senior grievant) were not violated. I disagree. Instead, the Union processed grievances filed by bargaining unit members who had each asserted that their

years. Abber had a Bachelor's degree in sociology/criminal science from Bridgewater State College, and had previous experience working with juveniles. Specifically, he served as a mentor supervisor at DARE family services, worked as a counselor at Judge Baker Children's Center, and was a youth counselor at the New England Home for Little Wanderers. Abber Exhibit #2A.

At the time of the promotion, Grievant Lynn Affonso had three months greater seniority than Abber. Joint Exhibit #2(2), p.1. Before working for the Probation Department, Grievant Affonso had been a DSS social worker, an assistant program supervisor and program supervisor at a juvenile residential program and had served as an intern with the Probation Department. Affonso graduated from Stonehill College, with a BA in criminal justice. Abber Exhibit #2B. Grievant Cavanaugh had been a Trial Court employee for about 17 years at the time of the challenged promotion. Previously, he had worked as the Assistant Director within the boys shelter care unit of the Old Colony Y. In addition, he had experience as an English teacher, a counselor, and a care coordinator and principal at a

contractual rights had been violated during the promotional

program serving truant adolescents referred by the Boston Juvenile Court. Cavanaugh received his BA in sociology from Roger Williams College. Abber Exhibit #2C.

A local interview panel convened to evaluate and rank the twenty seven candidates who had applied for the ACPO vacancy. Abber Exhibit #3. The panel was comprised of Judge Corbett, Joel West, the court's Chief Probation Officer (CPO), and Francis Campbell, a Regional Supervisor from the Office of the Commissioner of Probation. Abber Exhibit #4. Judge Corbett ranked Affonso #3, Cavanaugh #5 and Abber #8. CPO West and Campbell ranked Affonso #7. West ranked Cavanaugh #6 and Abber #8, while Campbell ranked Abber #3, and Cavanaugh #8. Abber Exhibit #3. The final interview round was comprised of the top eight candidates, with two ACPO positions to be filled.

At the remand arbitration, Nancy Roderick, a former First Assistant Clerk-Magistrate for the Plymouth County Juvenile Court testified. She testified that she knew Abber, Cavanaugh and Affonso and was "delighted" to learn of Abber's promotion, as she

process.

thought it was "well deserved." Transcript, Vol. I, p. 85.

Francis Campbell, a member of the local interview panel, provided testimony to the Independent Counsel. Campbell indicated that he did not generally participate in the local rounds of interviews, but recalled such participation in 2001 and 2008. Campbell testified that he never shared the names of recommended candidates with the judges on interview panels. Joint Exhibit #3, p. 128. He also indicated that, on most occasions, he shared the names of preferred candidates that he received from Wall with the chief probation officer sitting with him on the interview panel. Joint Exhibit # 3, p. 127.

Although Campbell, in his testimony to the Independent Counsel, did not refer to his participation in the 2005 promotional process at issue here, I extrapolate from his testimony and assume that, as with other interview panels, if Campbell received a name of preferred candidates in advance, he did not share that name with the judge on the panel. But, if he had received the name of a preferred candidate, it is likely that the individual's identity would have been shared with the chief probation officer.

Abber testified at the remand hearing. He indicated that, prior to his selection as ACPO in 2005, he had previously applied for other promotions. In about 2002-2003, he had applied for a promotion with the electronic monitoring program. Transcript, Vol. I, p. 94. In 2004, Abber applied for ACPO positions at the West Roxbury Municipal Court and for similar positions at the Suffolk Juvenile Court. Transcript, Vol. I, p. 96. At the remand arbitration, Abber conceded that he had asked his state senator for a recommendation for the electronic monitoring and West Roxbury ACPO positions, promotions that he did not receive. Transcript, Vol. I, pp. 98-100. Abber also verified the information contained within the records of the Office of Campaign and Political Finance to the effect that he made campaign contributions to his state senator, Marian Walsh, in September and November of 2004 and in February of 2005. Transcript, Vol. I, pp. 108-109.

Reviewing the remand record, a number of factors persuade me that the selection process was not solely based on the training, skills, abilities and experience of candidates. First, Campbell, the OCP representative on the local panel, testified that, although he had, in

some instances, received the names of preferred candidates, he never passed the names of those preferred candidates to the judge on a panel. As a result, I give extra weight to the evaluation and rankings of Judge Corbett, who knew and worked with Abber and the grievants. Of the eight candidates who went on to the final round, Abber received the lowest ranking -- #8 -- by Judge Corbett. Each grievant received higher marks, with Affonso receiving a #3 rank from Judge Corbett, while Cavanaugh was ranked # 6.⁹ Although Abber's candidacy and abilities were robustly supported by former-First Assistant Clerk-Magistrate Roderick, I decline to give her testimony more weight than the contemporaneous evaluation and ranking of Judge Corbett.

At the conclusion of the local round of interviews, Abber was at the bottom of Judge Corbett and CPO Walsh's list of final candidates (having been ranked #8 by each), but he was near the top of Campbell's list, with a #3 ranking. Then, following the final round of

⁹ The Trial Court argues that a judge's marks, as an individual free from the taint of pre-selection, should be, in effect, a dispositive indicator of a grievants' rights. Here, for example, neither Affonso nor Cavanaugh were in the judge's top two rankings. As a result, according to the Trial Court, neither could be contractually disadvantaged during the promotional process because, arguably, neither would have been selected anyway. Although I

interviews with Walsh and Wall, Abber was a top ranked applicant and received one of the two vacant ACPO positions. Wall and Walsh's evaluations and rankings, however, were unexplained at the remand arbitration. As a result, the remand record contains no rationale or basis for Abber's climb from the bottom of the group of candidates advanced from the local panel to being awarded a promotion position based on scores from Wall and Walsh.

The remand record, however, contains evidence of Abber's political contributions and his prior requests for recommendations from his state senator, with respect to promotional opportunities. Abber testified that he was friendly with the politician and had worked on her campaign. Transcript, Vol. I., pp. 108-111. While Abber specifically denied seeking a recommendation for the position at issue here, he acknowledged previously seeking promotional recommendations. His political contributions totaled \$505, with some donations made immediately before the promotional process and decisions at issue here.

Abber, however, contends that the grievants' contractual rights have not been violated here because,

regard the local judges' as an important piece of remand evidence,

based on their low final interview round rankings, they would not have been promoted, whether or not Abber was a selected candidate. This argument, however, is contingent upon the accuracy and reliability of Wall and Walsh's scores and rankings. At the remand arbitration, however, neither Wall nor Walsh provided evidence to support their awarded marks or rankings. On the other hand, the Ware Report contains information, including testimony received under oath, indicating that Wall and Walsh regularly provided names of preferred candidates and received names of candidates whom they ranked and scored. Joint Exhibit #3, p. 16. As the Independent Counsel indicated, without the cooperation of Wall and Walsh, it is "impossible to establish what the unbiased ranking for each position would have been." Joint Exhibit #3, p. 45. As a result, in the absence of an explanation for the rankings and scores here, I decline to rely on the unexplained final rankings to determine who, if not Abber, would have received the promotion.

In summary, the remand evidence indicates that the local judge ranked each of the grievants more highly than successful candidate Abber. The OCP

I decline to consider any judge's score as dispositive.

representative, who ranked Abber #3 out of 27 candidates, generally testified to the Independent Counsel that he had received names of recommended candidates.¹⁰ Then, without explanation, Wall and Walsh ranked Abber more highly than either grievant. The remand record also reflects Abber's series of political contributions. Overall, I am persuaded that the selection process was based on, or influenced by, criteria other than those established by the parties at Article 20.01. I am not persuaded that the 2005 selection for ACPO at the Plymouth Juvenile was based on an honest comparison of the qualifications of the competing applicants. As a result, I determine that the grievants' contractual rights have been violated.

As remedy, the Trial Court shall conduct a new selection process for the ACPO position at the Plymouth Juvenile Court originally posted in 2005. Access to the re-selection process shall be limited to the candidates who originally applied for the posted position and who remain employed by the Trial Court -- to the extent they wish to participate. The re-selection process shall be conducted by personnel who are tainted neither by the general promotion/hiring

¹⁰ Campbell, however, specifically recalled only his participation

scandal at the Probation Department nor by the particular facts of this underlying case.

Grievant:	Thomas Gentile
Successful Applicant:	Orlando Zayas, <u>Pro Se</u>
Original AAA No.	11 390 02315 06
	Joint Exhibit 2(4)

In February 2006, the Trial Court issued an in-house posting for an ACPD position in the Springfield District Court.¹¹ Eleven probation officers applied for the position, including the Grievant, Thomas Gentile and the successful applicant, Orlando Zayas. When he applied, Gentile was a Probation Officer II, with about 24 years of Trial Court experience, while Zayas, a Probation Officer I, had been with the Trial Court for about 12 years. Each had a Master's in Criminal Justice. Joint Exhibit #2(4), p. 3. Zayas indicated, on his application, that he was "Bilingual, Spanish Speaking." Joint Exhibit #2(4), p. 3; Zayas Exhibit #2.

in panels only in 2001 and 2008. Joint Exhibit #3, p. 126.

¹¹ This promotional process predates a second challenged ACPD promotion in the Springfield District Court, involving Grievant Rachel Joyce and Successful Applicant Terence O'Neil, by about seven months.